

June 9, 2014

Mr. Quinn M. Barrow  
Richards Watson Gershon  
355 South Grand Avenue, 40th Floor  
Los Angeles, CA 90071-3101

Re: Your Request for Advice  
**Our File No. A-14-084(a)**

Dear Mr. Barrow:

This letter responds to your request for advice, on behalf of Manhattan Beach City Councilmember Tony D’Errico, regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> We offer no opinion on the application of other laws, which may apply, such as common law conflict of interest. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### **QUESTION**

Does Councilmember D’Errico have a disqualifying conflict of interest in a city council decision regarding the adoption of an interim ordinance that prohibits changes in land-use pending the completion of a Downtown Plan?

### **CONCLUSION**

Councilmember D’Errico does not have a disqualifying conflict of interest in a decision regarding the adoption of the interim ordinance as any financial effect on his interests is not reasonably foreseeable.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

You are the City Attorney for the City of Manhattan Beach (the “City”) and have been authorized by Tony D’Errico, a member of the Manhattan Beach City Council, to request advice regarding the Act’s conflict-of-interest provisions as applicable to a proposed interim ordinance for development in the downtown area of the City (the “Ordinance”) pending completion of a Downtown Area Specific Plan (the “Downtown Plan”). At this time, the City has prepared a request for proposals from professional planning consultants for the preparation of the Downtown Plan. If an acceptable consultant is found, the City plans to present the consultant’s contract for the city council’s approval on or before July 15, 2014.<sup>2</sup>

When completed, the Downtown Plan will include new zoning and development regulations for the Downtown Plan area, design guidelines, parking arrangements, and will provide for an appropriate mix of land uses based on market conditions and an economic assessment of the trade-area. It is unknown at this time what regulations will be included in the final Downtown Plan.

While the Downtown Plan is developed, there is concern that the unchecked expansion or addition of non-retail uses could frustrate the purposes of the plan. To prevent this, the proposed Ordinance prohibits any change in land use during the period that the Downtown Plan is being developed. There would be two exceptions to the Ordinance. First, like-for-like changes (such as changing one restaurant for another or one retailer for another) would be allowed by right with no additional discretionary review by the City. Second, a change in land use would be permitted upon the approval of a conditional use permit by the City’s planning commission.

As anticipated, the Ordinance would only apply to properties located in the Downtown Plan area, which consist of 167 parcels on 24.20 acres. Mr. D’Errico and his wife jointly lease two properties located roughly in the center of the Downtown Plan area. The D’Erricos operate separate retail clothing stores on each property. The lease agreements for both properties are substantially the same in the following material respects:

- The premises are leased for the sole use as retail clothing stores, and no other use is permitted without the landlord’s prior written consent.
- The original terms of the leases are from May 1, 2011, through April 30, 2014. The D’Erricos have exercised an option to extend the leases for three years through April 30, 2017. (The D’Erricos have an additional three-year option for both leases.) In your email dated July, 2, 2014, you stated that the Councilmember has operated his clothing business at that location for seven years.

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<sup>2</sup> At this time, we are addressing only Councilmember D’Errico’s involvement in a decision regarding the interim ordinance. While you had originally sought assistance regarding Councilmember D’Errico’s involvement in a decision to select a consultant for the Downtown Plan and the adoption of the Downtown Plan, due to time constraints, you have asked that we consider only the interim ordinance and delay assistance regarding the other decisions pending the submission of additional facts necessary to make the determinations.

- Rent under both leases is subject to an escalator based on the Consumer Price Index.

If the Ordinance is adopted, the D’Erricos would not be able to change the use of either property without obtaining a conditional use permit from the planning commission. It is unknown whether this limitation will have any effect on the value of any of the properties in the Downtown Plan area. If the Downtown Plan is adopted, the property leased by the D’Erricos would be subject to its regulations, but it is unknown how the regulations would specifically affect the properties. You state that the D’Erricos have no plans to change the use of their properties during the terms of the leases.

### ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s interests. (Section 87103; Regulation 18700(a).)

#### **Steps One and Two: Is the individual a “public official” making, participating in making, or influencing a governmental decision?”**

As a member of the Manhattan Beach City Council, Councilmember D’Errico is a public official within the meaning of the Act<sup>3</sup> and is making, participating in making, or influencing a governmental decision when taking part in city council deliberations and decisions regarding the adoption of the Ordinance.<sup>4</sup>

#### **Step Three: What are the official’s interests that may be affected by the decision?**

Of the interests recognized under Section 87103 of the Act<sup>5</sup>, those interests that may be implicated by your account of the facts are the following:

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<sup>3</sup> A “public official” is “every member, officer, employee or consultant of a state or local government agency....” (Section 82048.)

<sup>4</sup> A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

<sup>5</sup> Our analysis is limited to the interests you have identified.

Retail Clothing Stores: As the joint owner and operator of two retail clothing stores, it appears that Councilmember D'Errico has an interest in each of the stores as a business entity. Assuming that Councilmember D'Errico receives income from either business of \$500 or more in the 12 months prior to the decision, he also has an interest in that business as a source of income. (Section 87103(a), (c) and (d); Regulations 18703.1(a) and (b) and 18703.3.)

Customers of Retail Clothing Stores: Under Section 82030(a), if a public official owns a 10-percent or greater interest in a business, customers who are sources of income to that business are also sources of income to the public official. Thus, Councilmember D'Errico has an interest in any customer of his stores if the income derived from the customer aggregates to \$500 or more in the 12 months prior to the governmental decision. (Section 87103(c); Regulation 18703.3.)<sup>6</sup>

Store Leases: An "interest in real property" includes "any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more" (Section 82033), excluding a periodic tenancy of one month or less (Regulation 18233.) Based upon the facts provided, the building leases are both for multi-year terms and it appears that the fair market value of the each lease is at least \$2,000 or more. Accordingly, Councilmember D'Errico has an interest in the real property on which each of the stores is located by virtue of his leases. (Section 87103(b); Regulation 18703.2.)

#### **Step Four: Are the official's interests directly or indirectly involved in the decision?**

##### Retail Clothing Stores:

Regulation 18704.1(a) states that a business entity or source of income is *directly* involved in a decision before the official's agency when that business entity or source of income, either directly or by an agent:

"(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

"(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person."

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<sup>6</sup> You have not identified any particular customer of the retail clothing stores. Therefore, we cannot analyze any potential conflicts of interest Councilmember D'Errico may have in a decision affecting a customer. If Councilmember D'Errico has additional questions related to an economic interest in a customer of his stores, he should seek further assistance providing all relevant facts.

A business entity or a source of income that is not directly involved in a governmental decision is regarded as *indirectly* involved. (Regulations 18704(a) and 18704.1(b).)

Based upon the facts provided, we must determine whether the retail clothing stores are a subject of any proceeding regarding the adoption of the Ordinance. In similar instances, we have previously advised that interests in businesses are only indirectly involved in decisions regarding general ordinances affecting a substantial number of similar businesses. For example, we have previously advised that an official's interest in a winery was indirectly involved in a decision regarding an ordinance affecting all wineries in the county (*Cooke* Advice Letter, No. A-99-127), and that an official's interest in a flower growing business was indirectly involved in a decision to set irrigation rates for a water district, where 50-percent of the district's water usage was for agricultural purposes (*Myers* Advice Letter, No. A-11-177b). Accordingly, Councilmember D'Errico's interests in his retail clothing stores are indirectly involved in a decision regarding the Ordinance.

#### Store Leases:

Pursuant to the recent repeal of Regulation 18704.2 and amendment of Regulation 18705.2, it is no longer necessary to determine whether an interest in real property is "directly" or "indirectly involved" in a decision.<sup>7</sup> Therefore, with respect to the property interests we move to the fifth and sixth steps.

#### **Steps Five and Six: Will there be a reasonably foreseeable material financial effect on the official's interests?**

##### **Materiality**

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest.

Retail Clothing Stores: For business entities *indirectly* involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. For a business not publicly traded and relatively modest in economic size, Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision is material if it is reasonably foreseeable that:

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<sup>7</sup> The Commission is currently in the process of revising regulations implementing the conflict-of-interest provisions of the Act. As part of this revision, the "directly involved/indirectly involved" test in current Step Four has been eliminated for economic interests in real property with surviving elements of the test merged into the materiality test in current Step Five. At the conclusion of the revision, it is anticipated that a similar approach will be adopted for all economic interests. (See Staff Memorandum to the Commission, *Determining the Material Financial Effect of a Decision on a Real Property Interest*, dated April 7, 2014.)

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

Councilmember D’Errico should consult Regulation 18705.1(c) to ensure that he identifies the materiality threshold actually appropriate to his retail clothing stores.

The Ordinance will maintain the status quo in the downtown area until the adoption of the Downtown Plan. Accordingly, it does not appear reasonably foreseeable that the Ordinance will result in any effect on the clothing business’s revenue, expenses, or assets and liabilities.

Store Leases: For a real property interest in a lease, current Regulation 18705.2(b) states, with limited exceptions, that the “reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold financial interest is material” if the decision will:

“(1) Change the termination date of the lease;

“(2) Increase or decrease the potential rental value of the property;

“(3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;

“(4) Change the official’s actual or legally allowable use of the real property;

“(5) Impact the official’s use and enjoyment of the real property.”

However, in conjunction with these regulatory standards for leases, we must also consider the exception in Regulation 18705(c) which provides:

“Notwithstanding 2 Cal. Code Regs. sections 18705.1 through 18705.5, inclusive, an official does not have to disqualify himself or herself from a governmental decision if: Although a conflict of interest would otherwise exist under 2 Cal. Code Regs. sections 18705.1 through 18705.5, inclusive, and 18706, the decision will have no financial effect on the person or business entity who

appears before the official, or on the real property in which the official holds a direct or indirect interest, or on the personal finances of the official and/or his immediate family.”

This regulatory statement reminds us that a conflict of interest under the Act must be based on a foreseeable material *financial* effect on an official’s interests.

The applicable foreseeability rule is provided in Regulation 18706(b), which states: “A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.” Regulation 18706 also provides some factors to consider in making this determination.

“(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official’s agency, or any other agency appointed by or subject to the budgetary control of the official’s agency.”

“(2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.”

“(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.”

“(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official’s economic interest could compromise the public official’s ability to act in a manner consistent with his or her duty to act in the best interests of the public.”

“(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official’s economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.”

“(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.”

We have advised in the past that the “existence, or conversely the nonexistence, of affirmative acts on the part of a public official to take advantage of the financial effect of a governmental decision is a factor to be considered in the analysis of the reasonable foreseeability of a financial effect.” (*Olson* Advice Letter, No. A-00-237.) While in this case, the Ordinance could foreseeably impose a detriment were Councilmember D’Errico intending to change the use of the property that he leases, under the facts presented this is not foreseeable absent extraordinary circumstances. The councilmember owns two clothing stores, operated at locations under lease. The Councilmember has operated his clothing business for seven years. You stated that he has no intent to change the current use of the leased premises. Thus, there will likely be no financial effect on Councilmember D’Errico or his interests, and he therefore does not have a conflict of interest.<sup>8</sup>

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Brian G. Lau  
Counsel, Legal Division

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<sup>8</sup> Steps seven and eight of the eight-step process provide two exceptions: the “public generally” exception and the “legally required participation” exception. Since we have concluded that Councilmember D’Errico does not have a conflict of interest in the decision, we do not analyze these exceptions.